NG HONG CHOON

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI & 1 LAGI

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CRIMINAL APPEAL NO. 05-213-92]
27 AUGUST 1994

ADMINISTRATIVE LAW: Preventive detention - Application for writ of habeas corpus - Whether civil or criminal in nature - Whether requirements of s. 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 had been complied with - Whether there was evidence that the designated officer had submitted his report 'forthwith' to the Minister - Respondent granted adjournment to file corrective affidavits - Adjournment granted at submission stage - Whether permissible - Whether additional evidence admissible.

PRACTICE & PROCEDURE: Habeas corpus proceedings - Procedure to be applied - Time by which affidavits have to be filed - Whether power in s. 425 of the Criminal Procedure Code was exercisable by the trial Court.

INTERPRETATION: Restrictive laws which deprive subjects of their right to personal liberty - Whether subject to strict construction - Whether to be construed in the same way as penal laws - Principles applicable.

The applicant was detained under the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). The applicant applied for a writ of *habeas corpus*. One of the affidavits filed on behalf of the respondents stated that the deponent received the report on the arrest and detention of the applicant and thereafter informed the Minister.

The applicant's Counsel contended that there was non-compliance with the requirements of s. 3(2)(c) of the Act in that it was not shown that the Minister had been informed 'forthwith'. The respondent requested for and was granted an adjournment to file further affidavits and after the affidavits were filed the applicant's motion was dismissed.

On the applicant's appeal, the respondents contended that the additional evidence, by way of the further affidavits, could be admitted and reliance was placed on s. 425 of the Criminal Procedure Code. The respondents further argued that the evidence introduced was of a trivial corrective nature i.e. a mere technicality.

Held:

[1] Section 425 of the Criminal Procedure Code is clearly intended to apply to a trial involving *viva voce* evidence in which witnesses can be examined, cross-examined and re-examined. A *habeas corpus* application on the other hand, which normally assumes the nature of a trial by affidavit, does not involve any witness. Even if the provision is to be applied, the discretionary and imperative provision of the section must be exercised only in rare cases and with utmost circumspection, especially so if the additional evidence sought to be introduced is likely to be prejudicial to the opposite party.

[2] Even if the power under s. 425 of the CPC is to be analogously applied to affidavit evidence, the normal rule as to the admission of additional evidence applies. As a general principle, evidence available to the adducer of fresh or additional evidence ***ab initio***, the relevance of which does not arise ***ex improviso*** which is intended to remedy defects in the adducer's own case is inadmissible. It follows that the principle against any attempt to adduce additional affidavit evidence especially after the aggrieved party has closed its case in cases affecting the liberty of the subject, must be applied with even greater vigilance by the trial Court.

[3] It is more practical to treat *habeas corpus* proceedings as being neither strictly criminal nor civil but as proceedings which are civil in form and criminal in substance. In matters relating to the format and procedural rules as to the use of affidavits, O. 54 of the Rules of the High Court and other related provisions may be resorted to but the proceedings must be conducted with the strictness of a criminal trial.

[4] In a motion for a *habeas corpus* application which is normally heard on affidavit evidence, the general principal of practice requires that both parties file their affidavits within such time as the Court may allow - which is usually two days before the date of hearing. In this case, the last affidavit was filed by the respondents on 24 December 1990, two days before the date fixed for hearing. On the basis of the affidavit evidence, as recorded, and as it stood before the Court on 26 December 1990, it could not be disputed that the defect in the respondents' affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal on the authority of *Tan Yap Seng v. Ketua Polis Negara & 2 Ors.*

[5] The respondent's contention that the strict rule on additional evidence should also apply to the applicant's Counsel's submission on the construction of the term 'forthwith' was without merit as Counsel was only raising a point of law in his submission on judicial precedent which only became available as a binding authority after the Supreme Court upheld the learned Judge's decision in *Tan Yap Seng's* case in between the adjourned hearings in the High Court.

[6] Even in normal rules on pleadings, a party may raise a point of law at the trial itself even though it had not been specifically pleaded. In the circumstances, the applicant was sufficiently entitled to raise an issue of law as one of his grounds in respect of an allegation of non-compliance with the mandatory provisions of the Act.

[7] The Court could not consider the manoeuvre to alter a sworn statement by a further affidavit nor the transformation of words by a later corrective affidavit to elude the authority of an unforeseen judgment, after the time for filing evidence has been closed, to be in any way trivial in nature. In any event, in cases of this nature the applicant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order.

[8] It is a recognised principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects fundamental rights to freedom - in this case Article 5 of the Federal Constitution - and whenever possible to be so construed as to afford respect and recognition of such right. The power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law and in the event of any failure to conform to such procedure, the Court may construe it favour of the subjects' liberty.

[9] On the basis of the need to conform strictly to procedures and having further regard to the fact that the additional evidence adduced after the close of the affidavit evidence was previously available to the respondents, the High Court should not have adjourned the hearing and subsequently allowed the respondents to file additional affidavits for the sole purpose of remedying an obvious defect in their case.

[10] Consequently on the original affidavit evidence, the provisions of s. 3(2)(c) of the Act had not been complied with and therefore the detention order issued by the Minister on 14 July 1990 in respect of the applicant is invalid.

[Appeal allowed. High Court Judge's order set aside. Detainee ordered to be produced forthwith before the Supreme Court to be set free].

[Ed. Note: This was a majority judgment of the Court, Gunn Chit Tuan CJ (Malaya) having retired on 20 May 1994 and the consent under s. 42(1) of the Courts of Judicature Act 1964 having been obtained from both parties**].**

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG PENTADBIRAN: Penahanan pencegahan - Permohonan bagi writ habeas corpus - Sama ada berbentuk sivil atau jenayah - Sama ada kehendak-kehendak s. 3(2)(c) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 telah dipatuhi - Sama ada terdapat bukti bahawa pegawai yang bertanggungjawab telah mengemukakan "dengan serta-merta" laporannya kepada Menteri - Responden telah diberikan penangguhan untuk memfailkan afidavit pembetulan - Penangguhan diberikan pada peringkat penghujahan - Sama ada dibenarkan - Sama ada keterangan tambahan boleh diterima.

AMALAN & PROSEDUR: Prosiding habeas corpus - Prosedur yang patut dipakai - Tempoh menjelang mana afidavit harus difailkan - Sama ada kuasa di bawah s. 425 Kanun Prosedur Jenayah boleh diamalkan oleh Mahkamah perbicaraan.

PENTAFSIRAN: Undang-undang terhad yang membuatkan orang-orang berkenaan tidak mempunyai hak bagi kebebasan peribadi - Sama ada tertakluk kepada pentafsiran yang ketat - Sama ada patut ditafsirkan dalam cara yang sama seperti undang-undang keseksaan - Prinsip-prinsip yang terpakai.

Pemohon telah ditahan di bawah peruntukan-peruntukan Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 (Akta tersebut). Pemohon telah memohon untuk suatu writ *habeas corpus*. Salah satu daripada afidavit yang difailkan bagi pihak responden menyatakan bahawa deponen telah menerima laporan mengenai penangkapan dan penahanan pemohon dan kemudiannya memaklumkan kepada Menteri.

Peguam pemohon menghujahkan bahawa s. 3(2)(c) Akta tersebut tidak dipatuhi dan bahawa tidak ditunjukkan bahawa Menteri telah dimaklumkan "dengan serta-merta". Responden telah memohon dan diberikan suatu penangguhan bagi memfailkan afidavit lanjutan dan selepas afidavit-afidavit tersebut difailkan, usul pemohon ditolak.

Atas rayuan oleh pemohon, responden menghujahkan bahawa keterangan tambahan, secara afidavit lanjutan, boleh diterima dan telah bergantung kepada s. 425 Kanun Prosedur Jenayah. Seterusnya responden menghujahkan bahawa bukti yang diketengahkan itu hanyalah merupakan suatu bentuk pembetulan yang kecil iaitu cuma dari segi teknikal.

Diputuskan:

[1] Seksyen 425 Kanun Prosedur Jenayah jelas bermaksud untuk dipakai dalam suatu perbicaraan yang melibatkan keterangan *viva voce* di mana saksi-saksi boleh diperiksa, diperiksa-balas dan diperiksa semula. Sebaliknya suatu permohonan *habeas corpus* yang biasa berupa perbicaraan melalui afidavit, tidak melibatkan saksi. Sekalipun jika peruntukan tersebut hendak dipakai, peruntukan budibicara dan penting seksyen tersebut hanya mesti diamalkan dalam kes-kes yang tertentu sahaja dengan berhati-hati, terutama sekali jika keterangan tambahan yang dipohon untuk diperkenalkan boleh menjejaskan pihak penentang.

[2] Sekalipun jika kuasa di bawah s. 425 KPJ hendak dipakai secara seakan-akan sama ke atas keterangan afidavit, kaedah biasa berhubung dengan penerimaan keterangan tambahan adalah terpakai. Sebagai prinsip am, keterangan yang ada pada pemberi akan keterangan baru atau tambahan *ab initio*, di mana kerelevanannya tidak berbangkit *ex improviso* yang bermaksud untuk membetulkan cacat-cela dalam kes pemberi itu sendiri tidak boleh diterima. Sebarang prinsip dalam usaha hendak mengemukakan keterangan afidavit tambahan selepas pihak yang terkilan menutup kesnya yang menjejaskan kebebasan orang-orang berkenaan, mestilah dipakai oleh Mahkamah perbicaraan dengan penuh kehematan.

[3] Adalah lebih praktikal untuk menyifatkan prosiding *habeas corpus* sebagai sesuatu yang bukan jenayah atau sivil tetapi sebagai prosiding yang merupakan sivil dari segi bentuk dan jenayah dari segi substans. Dalam perkara-perkara yang berkaitan dengan format dan kaedah-kaedah prosedur separi penggunaan afidavit, Aturan 54 Kaedah-kaedah Mahkamah Tinggi dan lain-lain peruntukan yang berhubung dengannya bolehlah digunakan, tetapi prosidingnya hendaklah dikendalikan seperti sebuah perbicaraan jenayah.

[4] Dalam suatu usul bagi permohonan *habeas corpus* yang biasanya didengar atas keterangan afidavit, prinsip am amalan menghendaki kedua-dua pihak memfailkan afidavit mereka dalam tempoh masa sebagaimana yang dibenarkan oleh Mahkamah - biasanya ialah dua hari sebelum tarikh pendengaran. Dalam kes ini, afidavit terakhir yang difailkan oleh responden ialah pada 24 Disember 1990, dua hari sebelum tarikh yang ditetapkan untuk pendengaran. Atas dasar keterangan afidavit, sebagaimana yang direkodkan, dan memandangkan ianya berada di hadapan Mahkamah pada 26 Disember 1990, tidak boleh dipertikaikan bahawa cacat-cela dalam afidavit responden apabila gagal untuk menyebutkan tarikh sebenar di mana laporan dikemukakan kepada Menteri membawa padah dengan berpandukan kepada autoriti *Tan Yap Seng lwn. Ketua Polis Negara & 2 Lagi.*

[5] Penghujahan responden bahawa kaedah yang ketat ke atas keterangan tambahan juga harus terpakai kepada penghujahan oleh Peguam pemohon atas pentafsiran terma "dengan serta-merta" adalah tanpa merit memandangkan Peguam berkenaan hanya membangkitkan suatu fakta undang-undang dalam penghujahannya atas duluan kehakiman yang hanya menjadi suatu autoriti yang mengikat selepas Mahkamah Agung menyokong keputusan Hakim yang bijaksana tersebut dalam keputusan kes *Tan Yap Seng* dalam ketika pendengaran-pendengaran yang ditangguhkan oleh Mahkamah Tinggi.

[6] Malah dalam kaedah-kaedah biasa atas pliding, sesebuah pihak boleh membangkitkan fakta undang-undang diperbicaraan itu sendiri walaupun ia tidak diguamkan secara khusus. Dalam hal ini, pemohon cukup berhak untuk membangkitkan suatu isu undang-undang sebagai salah satu alasannya berhubung dengan suatu pengataan ketidakpatuhan peruntukan-peruntukan mandatori Akta tersebut.

[7] Mahkamah tidak dapat menimbangkan langkah untuk mengubah suatu pernyataan bersumpah melalui afidavit lanjutan ataupun pengubahan perkataan-perkataan melalui afidavit pembetulan untuk terlepas daripada undang-undang akan penghakiman yang tidak dijangka, selepas tempoh masa untuk memfailkan keterangan tamat, sebagai remeh dalam apa cara jua. Walau apa pun, dalam kes-kes seumpama ini pemohon adalah berhak untuk mengambil kesempatan akan sebarang ketidaksempurnaan teknikal yang mempunyai kesan membatalkan perintah terhad.

[8] Adalah menjadi prinsip pentafsiran yang diiktiraf bahawa undang-undang yang berkenaan dengan hak-hak orang-orang tersebut haruslah ditafsirkan sempena dengan undang-undang yang menjamin hak-hak asasi orang-orang tersebut kepada kebebasan - dalam kes ini Perkara 5 Perlembagaan Persekutuan - dan apabila mungkin untuk mentafsirkan sedemikian bagi hak tersebut dihormati dan diiktiraf. Kuasa di bawah undang-undang terhad hanya boleh diamalkan mengikut prosedur yang terdapat di bawah undang-undang dan jika gagal untuk mengikut prosedur sedemikian, Mahkamah bolehlah mentafsirkannya sebagai memihak kepada kebebasan orang-orang tersebut.

[9] Atas asas keperluan untuk mengikut prosedur dengan ketatnya dan dengan mengambilkira fakta bahawa keterangan tambahan yang dikemukakan selepas penutupan afidavit keterangan pernah dimiliki oleh responden, Mahkamah tidak seharusnya menangguhkan perbicaraan dan membenarkan responden memfailkan afidavit-afidavit keterangan semata-mata bagi tujuan membetulkan suatu cacat-cela yang ketara dalam kes mereka.

[10] Akibatnya berhubung dengan afidavit keterangan asal, peruntukan s. 3(2)(c) Akta tersebut tidak dipatuhi dan oleh yang demikian perintah penahanan yang dikeluarkan oleh Menteri pada 14 Julai 1990 berhubung dengan pemohon adalah tidak sah.

[Rayuan dibenarkan. Perintah Hakim Mahkamah Tinggi diketepikan. Pemohon diperintahkan supaya dibawa ke hadapan Mahkamah Agung dengan serta-merta bagi dibebaskan].

Cases referred to:
Tan Yap Seng v. Ketua Polis Negara & 2 Ors. [1991] 2 CLJ 1400 ***(foll)***
PP v. Abdul Hamid [1969] 1 MLJ 53 ***(refd)***
Munusamy v. Subramaniam & Ors. [1969] 2 MLJ 108 ***(refd)***
Osman bin Mat Isa & Ors. v. Superintendent of Prison, Alor Star & Anor. [1974] 1 MLJ 189 ***(refd)***

Cheow Seong Chun v. Menteri Dalam Negeri, Malaysia & Ors.[1985] 2 CLJ 196 / [1985] 2 MLJ 95 ***(refd)***
Independant Automatic Sales Ltd. v. Knowles & Foster [1962] 3 All ER 27 ***(refd)***
Yati binti Aji & Fatimah binte Haji Mohamed Ariffin & Ors. [1969] 2 MLJ 186 ***(refd)***
Kearmal v. Vallupa Chelliar [1954] MLJ 119 ***(refd)***
Balfour v. PP [1949] MLJ Supp. 8 ***(refd)***
R v. Day [1940] All ER 402 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Ex parte Johannes Choeldi & Ors. [1960] 26 MLJ 184 ***(refd)***
Nagin Singh v. Jagannath, AIR 1944 Lah 422
Walsh v. Sec. of State for India [1863] 10 HLC 367 ***(foll)***
State of U.P. v. Lalai Singh Yadav [1977] CLR (SC) 121 ***(refd)***
Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor. [1990] 1 CLJ 423 / [1990] 1 MLJ 171 ***(refd)***
Re Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 365, 366, 367, 424 & 425
Courts of Judicature Act 1964, ss. 25, 42(1)
Dangerous Drug (Special Preventive Measures) Act 1985, s. 3(2)(a), (c)
Federal Constitution, Article 5
Rules of the High Court 1980, O. 38 r. 2(3), O. 54

For the appellant - Karpal Singh; M/s. Karpal Singh & Company
For the respondents - Dato' Hamid Embong, DPP

JUDGMENT

Wan Yahya bin Pawan Teh SCJ:
In this appeal we are particularly concerned with the issue as to whether in a hearing of a *habeas corpus* application, corrective and additional evidence by means of supplementary affidavits exhibiting documents tendered by the respondents after the applicant's Counsel had closed his case and commenced his submission, were properly admitted by the High Court; and if not so admitted, whether the requirement of s. 3(2)(c) of the Dangerous Drug (Special Preventive Measures) Act 1985 had been complied with.

What had transpired before the trial Court is not in dispute. The applicant (appellant before us) filed his notice of motion on 14 August 1990. The hearing was held on 26 December 1990. In his submission to the learned trial Judge, Mr. Karpal Singh for the applicant referred to two affidavits filed by the respondents on 8 October 1990 (16A page 26 Appeal Records). In the affidavit deposed by Insp. Zakaria on 28 September 1990, the deponent stated that the applicant was arrested on 16 May 1990 at 11.50 a.m. and that he authorised further detention not exceeding 24 hours of the applicant at 3.30 p.m on 17 May 1990. Counsel contended in the Court below that the continued detention of the applicant exceeding 24 hours, that is to say after 11.50 a.m. on 17 May 1990 without authorisation was in breach of s. 3(2)(a) of the Act, and was therefore illegal, but before us, this ground of appeal was abandoned and rightly so, as it could not be disputed that the appellant was arrested at 11.50 p.m. and not at 11.50 a.m. on 16 May 1990, and as such his continued detention after 11.50 a.m. on 17 May 1990 was still within the 24 hours period.

The main ground of appeal is whether s. 3(2) of the Act has been complied with on the basis of the available affidavit evidence filed in Court as at the commencement of the hearing when oral submission by the applicant's Counsel had already begun.

In the affidavit sworn by PPKP Osman bin Awal on 25 September 1990 (page 16 Appeal Records) the deponent merely stared at paragraph 2 that he received the report on the arrest and detention of the applicant from the investigating officer on 29 May 1990 and "seterusnya" (thereafter) he informed the Minister. In para 2 of his affidavit PPKP, Osman bin Awal stated as follows:

> Pada 29 Mei 1990, saya telah menerima lapuran hal keadaan penangkapan dan penahanan Ng Hong Choon (selepas ini disebut "Pemohon") dari Timbalan Penguasa Polis Yahya Bin Ismail dan seterusnya saya telah melapurkan hal keadaan itu kepada Menteri.

In respect of that affidavit, Counsel adopted the same argument as in *Tan Yap Seng v. Ketua Polis Negara & 2 Ors.* [1991] 2 CLJ 1400 in which Edgar Joseph Jr. (as he then was) held that in the absence of any evidence of the actual date on which the designated officer submitted his report to the Minister under s. 3(2)(c) of the Act the Court is not at liberty to presume that he had done so 'forthwith'. On appeal, this decision was upheld by the Supreme Court.

No doubt, as a result of the argument raised by the applicant, the respondents' Counsel sought for and was granted adjournment to enable him to file the additional affidavits. This was done despite the objection by the applicant's Counsel. The affidavits were then filed on 25 September 1991, that is, about 10 months later and the case was eventually proceeded with on 19 December 1991. The motion was dismissed on 27 December 1991.

Lest we forget, we have to warn ourselves against deflecting into considering the merits of the respondent's affidavits. We are anxious at the moment only to determine whether such additional evidence in the form of additional affidavits can be accepted at such a late stage of the proceedings.

Dato' Hamid Embong, the respondents' Counsel drew our attention to s. 425 of the Criminal Procedure Code and suggested that by analogy we could draw the inference that the additional evidence could be admitted. We are unable to accede to the contention for two reasons. Firstly, s. 425 is clearly intended to apply to a trial involving *viva voce* evidence in which witnesses can be examined, cross-examined and re-examined. Whereas a *habeas corpus* application which normally assumes the nature of a trial by affidavit, does not involve any witness who could be examined, crossed or re-examined. Furthermore even if the provision is to be applied, the discretionary and imperative provision of that section must be exercised only in rare cases and with utmost circumspection especially so if the additional evidence sought to be introduced is likely to be prejudicial to the opposite party. See *PP v. Abdul Hamid* [1969] 1 MLJ 53.

Before the repeal of O. 54 of the Rules of High Court on 1 August 1993, vide PU(A) 192/93 and at the time when this application was heard in the High Court, the provisions of both the repealed order and s. 365 of the Criminal Procedure Code were available as procedural guidelines.

We are aware of various authorities on the subject some of which have specified *habeas corpus* proceedings as civil whilst others as criminal and at least one had defined it as quasi-criminal. We do not consider it necessary for our present purpose to descend into the polemics of such classifications other than to comment on the circumstances and sequence of events following three of the following cases: In 1969 Abd. Hamid J. (as he then was) in his judgment in *Munusamy v. Subramaniam & Ors.* [1969] 2 MLJ 108, dealt with exhaustively the origin and development of the High Court's power in issuing writs in the nature of *habeas corpus* commencing from the Enactment of 1918 until the date of the judgment in 1969. At page 110 of the judgment, the learned Judge said:

> The power to issue directions, orders, or writs of the nature of *habeas corpus* for the enforcement of any of the rights under Part II is however subject to the proviso contained in sub-section (2) of section 25 of the Act, which provides that:
>
> > All such powers shall be exercised in accordance with any written law or Rules of Court relating to the same.
>
> The only written law relating to directions of the nature of *habeas corpus* can be found under Part XXXVI of the F.M.S. Criminal Procedure Code, s. 365 of the Criminal Procedure Code provides powers to the Court of a Judge to direct that any person who is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation is to be set at liberty. Under Chapter XXXVI provisions governing applications, affidavits, warrants, service of warrants and appeals were also made. Whatever may have been the position before the Courts of Judicature Act 1964 came into effect, it seems to me that by reason of s. 25 of the Act the additional powers of the High Court as set out in the first schedule must he exercised only in accordance with any written law relating to the same, and Chapter XXXVI of the Criminal Procedure Code being provision relating to directions in the nature of *habeas corpus*, would apply.

The rationale in this judgment was followed by Chang Min Tat J. (as he then was) in *Osman bin Mat Isa & Ors. v. Superintendent of Prison, Alor Star & Anor.* [1974] 1 MLJ 189 at 191 wherein the learned Judge stated:

> Applying the test in *Amand's* case then, how could I come to any other conclusion than that these matters are criminal causes? I therefore adopt with respect the decision of my brother Abdul Hamid J, in *Munusamy's* case, that the matter was governed by Part XXXVI of the Criminal Procedure Code (Cap. 6) in the Malay States and the application should have been made under s. 365 thereof.

Subsequently in *Cheow Seong Chun v. Menteri Dalam Negeri, Malaysia & Ors.* [1985] 2 MLJ at 95 Abdoolcader, SCJ whilst delivering the judgment in the Court on a different issue of law, felt it necessary to suggest in a footnote that Parliament should perhaps consider repealing s. 365 and such of its relative provisions in Chapter XXXVI of the Criminal Procedure Code as these provisions had been rendered redundant by the introduction of O. 54 of the Rules of High Court.

Unfortunately these comments have been interpreted by some legal circles as tending to show that *habeas corpus* proceedings are no longer criminal in nature. We do not think that the remarks in *Cheow Seong Chun's* case was intended to mean anymore than what the learned SCJ had said, bearing in mind the legislative changes that had taken place since the two earlier cases were decided. *Munusamy's* and *Osman's* cases (supra) were decided in 1969 and 1974 respectively at the time when the former Rules of the Supreme Court 1957, which contained no provision on *habeas corpus* provision were in force. The only applicable provisions relating to such proceedings were then only to be found in the Criminal Procedure Code. Pursuant to s. 25 of the Courts of Judicature Act 1964, the learned trial Judge in *Munusamy's* case applied the only written law relating to the power to issue *habeas corpus* and the only written law at that point of time was s. 365 of the Criminal Procedure Code. Likewise in *Osman's* case, the trial Judge applied the same principle in refusing costs in a criminal application.

In between the two decided cases and *Cheow Seong Chun's* case, there was a legislative change in the law relating to civil procedure. The Rules of the Supreme Court were repealed and the present High Court Rules 1980 which came into force on the 1 June 1980 contained specific provisions on *habeas corpus* in O. 54. That probably precipitated the suggestions made in *Cheow Seong Chun's* case. Be it so, the subsequent legislative change after the comments took an unexpected turn, O. 54 of the Rules of High Court was revoked. Even so the footnote appears to us to be neither the *ratio decidendi* nor the *obiter* of that Supreme Court judgment. At most, it was only a helpful note intended to persuade the Legislature into settling the somewhat ambiguous aspect of that law. Although the power for issuing *habeas corpus* order at that time fell under s. 365 of the Criminal Procedure Code (the Code), the provisions of the Code itself were silent on the mode of procedure leaving such matters to be regulated by O. 54 of the Rules of High Court 1980 (the Rules). For instance, the right to use an affidavit in support of a motion of *habeas corpus* is reflected in ss. 366, 367 and 424 of the Code but the provisions in respect of a trial by affidavit appear in O. 38 r. 2 (3) of the Rules. Even so, both the Code and O. 54 of the Rules did not provide the specific procedures to be followed during trial proper.

However in our present appeal we are not unduly troubled with the consequential effects of the legislative amendment to O. 54. At the time when this case was heard in the High Court that order was still in force and therefore the provision of both O. 54 and s. 365 of the Code were applicable in *habeas corpus* proceedings.

Perhaps it is more practical for the purpose of this case to treat *habeas corpus* proceedings as being neither strictly criminal nor civil but as proceedings which are civil in form and criminal in substance. In matters relating to the format and procedural rules as to the use of affidavits, O. 54 and other related provisions may be resorted to but the proceedings must be conducted with the strictness of a criminal trial.

We consider that in a motion for *habeas corpus* application which is normally heard on affidavit evidence, the general principle of practice requires that both parties file their affidavits within such time as the Court may allow - which is usually two days before the date of hearing. It is

a only at tbe conclusion of the pleadings or in our present motion, at the close of the evidence that the Court proceeds to hear the submissions and make a finding by due consideration of affidavit evidence to determine the truth of the point in issue raised by the parties.

In this case, the last affidavit was filed by the respondents on 24 December 1990, two days before the date fixed for hearing. Obviously the time for accepting affidavit evidence had been closed 2 days before the hearing date i.e. on 24 December 1990 when the respondents' last affidavit was
b filed and as there was no indication by the appellant to file any reply to the respondent's affidavit, the Court had proceeded to consider the merits of the motion on the 26th on the fundamental ingredient of all the affidavit evidence before it.

On the basis of the affidavit evidence, as recorded, and as it stood before the Court at the hearing on 26 December 1990, it cannot be disputed that the defect in PPKP Osman's affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal on
c the authority of *Tan Yap Seng v. Ketua Polis Negara & 2 Ors.* which was confirmed by the Supreme Court by the time the adjourned application of the applicant came up for hearing.

During the hearing it was also submitted to us by Counsel for the respondents that the strict rule on additional evidence should likewise apply to the appellant's Counsel's submission on the construction of the term 'forthwith'. Counsel states that Mr. Karpal Singh should be similarly precluded from taking up this issue because such issue was not raised in any of the affidavits
d filed in support of the application. We would have agreed with the respondents' Counsel's submission if what was sought to be further introduced was in the nature of affidavit evidence. In this particular instance the appellant did not attempt to file any affidavit. His Counsel, Mr. Karpal Singh was only raising a point of law in his submission on judicial precedent which only became available as a binding authority after the Supreme Court upheld Edgar Joseph J's decision in *Tan Yap Seng's* case *(supra)* in between the adjourned hearings in the High Court.

e Even in normal rules on pleadings, a party may raise a point of law at the trial itself even though it had not been specifically pleaded. See *Independant Automatic Sales Ltd. v. Knowles & Foster* [1962] 3 All ER. 27.

Under the circumstances we consider that the applicant was sufficiently entitled to raise an issue of law as one of his grounds in respect of an allegation of non-compliance with the mandatory provisions of the Act.

f It could not be denied that on the evidence available at the close of the affidavit evidence, the respondents were clearly in breach of the provisions of the Act, in that they had failed to comply with the mandatory requirement of proviso (c) to s. 3(2) of the Act. Indeed, if that was not so the respondents' Counsel would not have applied for an adjournment after the first point was taken up in the submission by Counsel for the appellant and had proceeded to file, almost a year later, two additional affidavits to rectify the errors.

g Before us the respondents' Counsel proffered two grounds in support of the decision to adjourn and admit additional and corrective affidavits. Firstly it was argued, as previously submitted before the trial Judge that the correction was only of a trivial nature and secondly (not so raised before the lower Court) that, by analogy, the power in s. 425 of the CPC was exercisable by the trial Court.

On the second ground as put forth by the Counsel, we have to revert to what has been said earlier
h that s. 425 applies only to *viva voce* evidence. Even if such power is to be analogously applied to affidavit evidence, the normal rule as to the admission of additional evidence applies. We do not propose to go into the mass of authorities dealing with fresh or further evidence. It would suffice if we were to reiterate the principle that the admission of such evidence is only confined to circumstances where the evidence sought to be adduced is raised *ex impromptu* or that such evidence was not available with reasonable diligence at the time when the evidence of both parties had been closed. See *Yati binte Aji & Fatimah binte Haji Mohamed Ariffin & Ors.* [1969]
i 2 MLJ 186; *Kearmal v. Vallupa Chelliar* [1954] MLJ 119; *Balfour v. PP* [1949] MLJ Supp. 8; *R v. Day* [1940] All ER 402: *Ladd v. Marshall* [1954] 3 All ER 745.

The above cases demonstrate the strictness with which the Courts have applied the conditions for admitting fresh *viva voce* evidence. As a general principle, evidence available to the adducer of fresh or additional evidence ***ab initio,*** the relevance of which does not arise ***ex improviso*** which is intended to remedy defects in the adducer's own case is inadmissible. It follows that the principle against any attempt to adduce additional affidavit evidence especially after the aggrieved party has closed its case in cases affecting the liberty of the subject, must be applied with even greater vigilance by the trial Court.

The reasons given for the admission of the additional affidavit in the trial Court was that the evidence intended to be introduced was of a trivial corrective nature or in other words, a mere technicality. We do not consider the manoeuvre to alter a sworn statement by a further affidavit nor the transformation of words by a later corrective affidavit to elude the authority of an unforeseen judgment, after the time for filing evidence has been closed, to be in any way trivial in nature. In any event, in cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order; or to use the precise words of Regby J in *Ex Parte Johannes Choeldi & Ors.* [1960] 26 MLJ 184 at 186:

> The distinction, no doubt, is a highly artificial one. But this is an application for a writ of *habeas corpus*, and the applicants in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws - see *Nagin Singh v. Jagannath*, AIR 1944 Lah 422. It is a recognised principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects' fundamental rights to freedom - in our instant case Article 5 of the Federal Constitution - and whenever possible to be so construed as to afford respect and recognition of such right - *Walsh v. Sec. of State for India* [1863] 10 HLC 367 in particular at 386 per Lord Westbury LC. The power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law - *State of U.P. v. Lalai Singh Yadav* [1977] CLR (SC) 121; and in the event of any failure to conform to such procedure, the Court may construe it in favour of the subjects' liberty. See *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Another* [1990] 1 MLJ 171. The need to conform strictly to procedure has been expressed by Lee Hun Hoe CJ Borneo in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 in the following term:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law the detention is bad and the person detained is entitled to be released forthwith.

On the basis of the aforementioned authorities on strict interpretation and the need to conform strictly to procedures and having further regard to the fact that the additional evidence adduced after the close of the affidavit evidence was previously available to the respondents, we hold by a majority view (Gunn Chit Tuan CJ having retired on 20 May 1994 and the consent under s. 42(1) Courts of Judicature Act 1964 having been obtained from both parties) that the High Court should not have adjourned the hearing and subsequently allowed the respondents to file additional affidavits for the sole purpose of remedying an obvious defect in their case.

Consequently on the original affidavit evidence on which Counsel for the appellant had based his submission before the High Court, we hold that the provision of s. 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 has not been complied with and therefore the Detention Order issued by the Minister on 14 July 1990 in respect of Ng Hong Choon is invalid.

We accordingly allow this appeal and set aside the Judge's order dated 27 December 1991. It is further ordered that the detainee, Ng Hong Choon be produced forthwith before this Court to be set free.